from that of any other case under Order 14. An Order 14 order in the view we have always taken of it is a very stringent procedure because it shuts the door of the court to the defendant. The jurisdiction ought only to be exercised in proper cases. If the University and University Colleges Acts and related legislation come into an Order 14 case, no greater attention in principle is to be given by the court to that class of action than to any other class of action. The only point is that as everybody knows the pertinent legislation is long and complicated. But it is not sufficient under an Order 14 case to flourish the title of the University and University Colleges Act, etc., in the face of the court and say that is enough to give leave to defend. If a point taken under the Acts is quite obviously an unarguable point, and the court is satisfied that it is really unarguable, the court has precisely the same duty under Order 14 as it has in any other case. The court has the duty to apply the rule: (see *Harry Tong Lee Hwa* v. *Yong Kah Chin*[5]).

In *Esso Standard Malaya Bhd.* v. *Southern Cross Airways (M) Bhd.*[6] I pointed out that in an Order 14 case, where it turned on the construction of a few documents, and the court was only concerned with what, in its judgment, was the true construction, there could be no reason to go formally to trial where no further facts could emerge which would throw any light on the documents that had to be construed. We think we can safely apply that principle to the present case. On the view we have taken of the construction of Act 30 of 1971, and the Constitution of the University, the University had an absolutely hopeless case. The only function of the court is *jus dicere* and to ascertain the intention of Parliament from the words used in the statutes and nothing more. No useful purpose would then be served to go formally to trial.

We accordingly allowed the appeal.

Appeal allowed.

Solicitors: *Syed Ibrahim & Co.; Zain & Co.*

PAHANG SOUTH UNION OMNIBUS CO. BHD. v. MINISTER OF LABOUR AND MANPOWER & ANOR.

[F.C. (Raja Azlan Shah C.J. (Malaya), Abdul Hamid F.J. & Abdoolcader J.) May 23 & June 29, 1981]

[Kuala Lumpur — Federal Court Civil Appeal No. 82 of 1980]

Administrative Law — Certiorari — Claim for recognition of trade union — Decision of Minister — No error of jurisdiction — Certiorari does not lie.

Industrial Law — Recognition of trade union — Decision of Minister — No error of jurisdiction — Certiorari does not lie — Industrial Relations Act, 1967, s. 9(5).

Courts of Judicature Act, 1964, ss. 25(2), 35 and para. 1 to schedule — Industrial Arbitration Act, 1967, s. 9(5) — Whether conflicting.

In this case a trade union had applied for recognition by the appellants. The Minister after considering the result of a membership check by the Registrar of Trade Unions, accorded recognition to the trade union. The appellants applied for *certiorari* but the application was dismissed in the High Court. The appellants appealed.

Held: the Minister in this case had not erred at all and even if he had, it did not go to jurisdiction nor did he infringe the rules of natural justice. There was therefore no cause for justified complaint by the appellant.

Cases referred to:-

(1) *In re Bowman* [1932] 2 K.B. 621, 633.
(2) *Ohene Moore* v. *Akesseh Tayee* [1935] A.C. 72, 75.
(3) *General Electric Co.* v. *Price Commission* [1975] I.C.R. 1, 12.
(4) *Healey* v. *Minister of Health* [1955] 1 Q.B. 221.
(5) *In re H.K. (An infant)* [1967] 2 Q.B. 617, 630.
(6) *Reg.* v. *Gaming Board for Great Britain, ex parte Benaim and Khaida* [1970] 2 Q.B. 417.
(7) *Punton* v. *Ministry of Pensions and National Insurance* [1963] 1 W.L.R. 186.
(8) *Ashbridge Investments Ltd.* v. *Minister of Housing and Local Government* [1965] 1 W.L.R. 1320.
(9) *Padfield* v. *Minister of Agriculture, Fisheries and Food* [1968] A.C. 997, 1007, 1061.
(10) *Associated Provincial Picture Houses Ltd.* v. *Wednesbury Corporation* [1948] 1 K.B. 223.
(11) *Anisminic Ltd.* v. *Foreign Compensation Commission* [1969] 2 A.C. 147.
(12) *Sydney Municipal Council* v. *Campbell* [1925] A.C. 338.
(13) *Minister of Labour and Manpower* v. *Paterson Candy (Malaysia) Sdn. Bhd.* [1980] 2 M.L.J. 122, 124.
(14) *National Union of Hotel, Bar and Restaurant Workers* v. *Minister of Labour and Manpower* [1980] 2 M.L.J. 189, 191.
(15) *Foh Hup Omnibus Co. Berhad* v. *Minister of Labour and Manpower & Anor.* [1973] 2 M.L.J. 38, 39-40.
(16) *Mogah Bus Company* v. *Minister of Labour and Manpower and the Transport Workers Union.* K.L. High Court Originating Motion No. 40 of 1973.
(17) *United Kingdom Association of Professional Engineers & Anor.* v. *Advisory, Conciliation and Arbitration Service* [1980] 2 W.L.R. 254.
(18) *Mak Sik Kwong* v. *Minister of Home Affairs, Malaysia (No. 2)* [1975] 2 M.L.J. 175, 179, 181.
(19) *Lewis* v. *Heffer* [1978] 1 W.L.R. 1061, 1076-1077.
(20) *Bushell & Anor.* v. *Secretary of State for the Environment* [1980] 3 W.L.R. 22.
(21) *Regina* v. *Commission for Racial Equality, ex parte Cottrell & Rothon* [1980] 1 W.L.R. 1580.
(22) *South-East Asia Fire Bricks Sdn. Bhd.* v. *Non-Metallic Mineral Products Manufacturing Employees Union* [1980] 2 M.L.J. 165; 3 W.L.R. 318; 2 All E.R. 689.
(23) *Colonial Bank of Australasia* v. *Willan* [1874] L.R. 5 P.C. 417.
(24) *Essex Incorporated Congregational Church Union* v. *Essex County Council* [1963] A.C. 808, 834-835.

HIGH COURT.

S. Kulasegaran for the applicant.

Stanley Isaac (Federal Counsel) for the 1st respondent.

K. Chandran for the 2nd respondent.

Cur. Adv. Vult.

Wan Hamzah J.: On December 3, 1975 the Second respondent Union made a claim for recognition, and as a result the Registrar of Trade Unions carried out a membership check, which showed it represented 43.2% only of the employees of the applicant. Therefore the applicant refused to give recognition. The Union accepted the decision of the applicant and thus did not report the matter to the Minister under section 9(4) of the Industrial Relations Act and the Minister did not make any decision under section 9(5) in respect of that claim. Therefore section 12 did not apply

so as to bar the Union from making a further claim for recognition.

On January 8, 1977 the Union made another claim for recognition, and a fresh membership check carried out by the Registrar of Trade Unions showed that now it represented 62.76% of the applicant's employees. The applicant still refused to give recognition and upon a report on the matter being made to him, the Minister pursuant to section 9(5) gave his decision on July 12, 1977 that the applicant should accord recognition to the Union. The applicant brings these *certiorari* proceedings to quash the decision of the Minister.

Section 9(5) includes the following provisions: "decision of the Minister under this section shall be final and shall not be questioned in any court". This means that the Minister's decision is not subject to review by the court by *certiorari* merely on the ground of error of law on the face of the record, and *certiorari* is available only if the Minister has acted in excess of his jurisdiction or if his decision is a nullity as the result of breach of the rules of natural justice. This is settled law, *vide* the judgment of the Privy Council in *South-East Asia Fire Bricks Sdn. Bhd.* v. *Non-Metallic Mineral Products Manufacturing Employees Union & Ors.*[22] It is therefore necessary to examine what the complaints of the applicant really are.

It was alleged by the applicant as follows. The Registrar of Trade Unions carried out membership check in the absence of the applicant and of the Union and made a finding that 62.76% of the employees were members of the Union. The applicant then carried out its own survey and came to the conclusion that 61 employees out of a total of 110 were not members of the Union, leaving only 49 employees as members. The outcome of this survey was conveyed to the Director-General of Industrial Relations with a request for a further membership check in the presence of representatives of both the Union and the applicant or alternatively that the matter be referred to the Industrial Court. This request was not complied with, and the Minister made his decision without the proposed check. It was further contended by the applicant that the Registrar of Trade Unions did not know the identity of the employees and was unable to ascertain whether each signature on the application form for Union membership was the genuine signature of an employee or a forged signature, and the Registrar would be able to ascertain this if he made the check with the help of the applicant's representative. The applicant complained that the Minister had not given opportunity to it to examine the Union's documents or to make representation to him in respect thereof and therefore when making his decision he failed to apply the principles of natural justice.

According to the affidavit of the Registrar, he examined the following documents when he carried out membership check on the two occasions: —

(a) Application forms for membership;

(b) Membership/subscription register kept by the Union;

(c) Receipt books for entrance fees and subscriptions;

(d) Minutes book of the Union's Executive Council wherein approvals of membership were recorded;

(e) List of employees submitted by the applicant.

The Registrar stated further in his affidavit that he adopted the same method of checking on both occasions and the applicant accepted the result of the first membership check without complaining against the method of checking. He was satisfied that the Union had complied with the requirements of its constitution relating to membership and therefore he found no reason to doubt the validity and genuineness of the documents and records of the Union. He had received no complaint against validity and genuineness.

In his affidavit the Minister stated that in making his decision in the matter he had considered the question of impartiality of the Registrar in the matter, and apparently he was satisfied with his impartiality. On the facts placed before the court I do not think that there is anything contrary to the principles of natural justice for the Minister to accept the Registrar's impartiality and to adopt his findings under the circumstances. The Minister also stated that he had considered the applicant's request to be present during the membership check. This implies that he had considered the possibility of the applicant wanting to examine the Union's documents and to make representations in respect of them. Again I find nothing in the facts placed before the court which shows that the Minister had acted contrary to the principles of natural justice in finding that the applicant's presence at membership check was not necessary under the circumstances or that it was not necessary under the circumstances to allow the applicant to examine the Union's documents and to make representation in respect of them. The only representation which the Union might possibly make regarding the Union's documents was, as indicated by the applicant, objection as to their genuineness. Apparently the Minister had considered this question, and on the facts disclosed in the Registrar's affidavit there should not be any cause for complaint if the Minister entertained no doubt as to the genuineness of the documents. The applicant has not shown any reason why there should be any doubt as to the genuineness of the documents or as to the correctness of the finding of the Registrar. If there is any fact at all which can possibly be put forward by the applicant as a ground for the doubt, it might be the result of the survey which it had carried out on its own. But it has failed to disclose what method of survey it had adopted or shown that its own method was a reliable one.

The applicant also complained that the Minister should have followed the same principles and procedures adopted by the Industrial Court in resolving a dispute as to membership. There is no law requiring that the Minister should do so. As to the applicant's request that the dispute be referred to the Industrial Court, again the applicant fails to show the law requiring the Minister to do so. There is no question of the Minister having acted in excess of his jurisdiction as he was empowered to make the decision by section 9(5).

I therefore dismissed the applicant's motion.

From the above judgment the applicant appealed to the Federal Court.

FEDERAL COURT.

S. Kulasegaran for the appellant.

P.M. Mahalingam (Senior Federal Counsel) for the last respondent.

K. Chandra for the 2nd respondent.

Cur. Adv. Vult.

Abdoolcader J. (delivering the judgment of the Court): This appeal involves the question of the validity *vel non* of the 1st respondent's determination of a trade union recognition dispute between the appellant and the 2nd respondent when he decided on July 12, 1977 that recognition be accorded to the latter in the exercise of his powers under section 9(5) of the Industrial Relations Act, 1967 as it stood before its amendment on September 15, 1980, and all references to section 9 in this judgment will accordingly be to that provision of the Industrial Relations Act prior to the 1980 amendment. We should perhaps add that with the amendment of section 9, the Industrial Relations Regulations, 1980 were enacted and also took effect on September 15, 1980, providing *inter alia* in respect of a claim for recognition by a trade union for the particulars and information that the Director-General of Industrial Relations may require to be furnished to him but these regulations do not apply to the present proceedings and do not therefore concern us.

On December 3, 1975 the 2nd respondent made a claim for recognition by the appellant under section 9(2) in respect of its employees but the appellant refused on the ground that a majority of its employees were not members of the 2nd respondent and suggested a membership check by the Director of Industrial Relations in the presence of both parties to which the 2nd respondent objected. The appellant then furnished the Director of Industrial Relations on request with a list of its employees, and by a letter dated September 2, 1976 the Director-General of Industrial Relations informed the appellant that a membership check carried out by the Registrar of Trade Unions showed that the 2nd respondent only had 43.2 per cent of the appellant's employees as its members. The appellant replied on September 24, 1976 that it was not in the circumstances prepared to accord recognition to the 2nd respondent. The matter rested there until the 2nd respondent wrote once again to the appellant on January 8, 1977 making a second claim for recognition which is the pertinent subject-matter of this appeal.

We pause here to dispose of a point taken on behalf of the appellant in reliance on the provisions of section 12 of the Industrial Relations Act which, briefly, prohibit any further claim for recognition where the 1st respondent has decided against according recognition to a trade union until three months have elapsed after the decision, and the appellant's contention in this regard is to the effect that as the 1st respondent had made no decision as such in respect of the first claim for recognition by the 2nd respondent in December 1975, the second claim for recognition was precluded and accordingly invalid. The short and simple answer to this lies in the uncontroverted affidavits of the 1st respondent, the Deputy Director-General of Industrial Relations and the General Secretary of the 2nd respondent which disclose that the first claim for recognition had been resolved through the offices of the Director-General of Industrial Relations as the 2nd respondent did not dispute the results of the membership check then carried out by the Registrar of Trade Unions and had also accepted the decision of the appellant not to accord recognition, and the 1st respondent was not therefore required to make any decision under section 9(5) and he did not accordingly do so.

Section 9(5) requires the 1st respondent to take such steps or make such inquiries as may be necessary or expedient to resolve the matter or to give a decision thereon upon receipt of a report under subsection (4). The report under section 9(4) is a prerequisite to the 1st respondent taking cognizance and assuming jurisdiction in the matter and he has the alternative under section 9(5) of either taking steps or making inquiries (which by section 9(6) include such action taken or made by or under the direction of the Director-General of Industrial Relations) to resolve the matter or to give a decision thereon. Section 12 does not in the circumstances have any application in the present proceedings and we cannot therefore see any substance in the argument in this respect which Mr. Kulasegaran for the appellant merely advances, and somewhat less than half-heartedly at that, for our consideration on a technical point, as he puts it.

Reverting to the second claim for recognition made in January 1977 by the 2nd respondent, it was once again disputed by the appellant that the 2nd respondent had a majority of the appellant's employees as its members. The 2nd respondent then reported the matter in writing to the first respondent under section 9(4) and on February 8, 1977 the Director of Industrial Relations wrote to the appellant requesting two copies of a list of its employees as at January 8, 1977 which were sent to him on February 28, 1977. The appellant was informed by the Director-General of Industrial Relations by a letter dated May 12, 1977 that the Registrar of Trade Unions had carried out a membership check and found that 62.76 per cent of its employees were members of the 2nd respondent.

The appellant then carried out a survey of its employees which allegedly disclosed only 49 out of its 110 employees as members of the 2nd respondent, thus forming only a minority and it conveyed the result of this survey to the Director-General of Industrial Relations on June 22, 1977 with a request for a further membership check in the presence of representatives of both the appellant and the 2nd respondent or alternatively for the matter to be referred to the Industrial Court. We must, however, immediately observe that the latter alternative suggested was not open to the appellant under the Industrial Relations Act as it then stood after amendment on October 9, 1969. The Director-General of Industrial Relations

under cover of a letter dated July 30, 1977 to the appellant enclosed the 1st respondent's decision in writing dated July 12, 1977 under the provisions of section 9(5) according recognition to the 2nd respondent.

The appellant complains that the membership check carried out by the Registrar of Trade Unions was improper and wrong and contrary to the principles of natural justice, primarily and basically on the premise that he made no verification of the signatures of the appellant's employees in the application forms for membership in the 2nd respondent in the presence of the parties concerned. It accordingly obtained leave on October 4, 1977 to apply for an order of *certiorari* to quash the 1st respondent's decision to accord recognition to the 2nd respondent but its substantive motion for *certiorari* was dismissed by Wan Hamzah J. on March 19, 1980 and the matter now comes on appeal before us.

Turning now to the respondents' presentation in the matter: The 1st respondent in his affidavit states that in arriving at his decision on July 12, 1977 he had taken into consideration all the relevant facts, the appellant's request to be present during the membership check, the 2nd respondent's rejection of the request made and the Registrar of Trade Unions' impartiality in the matter. The Registrar of Trade Unions made an affidavit narrating in some depth the procedure he adopted in carrying out the membership check in connection with the 2nd respondent's first claim for recognition in December 1975 and specifying the several documents and records utilised and resorted to for this purpose, and again on the same lines in relation to the second claim for recognition in January 1977 which culminated in the 1st respondent's decision according recognition to the 2nd respondent which is in question in this appeal. He gives details as to how he arrived at the conclusion that 62.76 per cent of the appellant's employees were *bona fide* members of the 2nd respondent and categorically states that there was no reason to doubt the validity and genuineness of the documents and records he examined and the signatures in the application forms for membership in the 2nd respondent and that he had received no complaints in respect thereof.

Neither the learned judge nor this court is sitting on appeal against the decision of the 1st respondent. An appeal is the creature of statute and will only lie if a statute gives such a right and then only within the limits which the statute giving the right stipulates (*In re Bowman*[1] (at page 633 *per* Swift J.); (*Ohene Moore* v. *Akesseh Tayee*[2] (at page 75 *per* Lord Atkin)). No appeal lies from a decision of the 1st respondent under section 9(5). When no appeal lies from a decision, judicial review cannot be resorted to as an *alter modus* for an appeal by way of circumventing or repairing that omission. The scope of judicial review is narrower and limited and it would be useful and apposite to reproduce *in extenso* the delightfully lucid and comprehensive exposition on this aspect by Lord Denning M.R., in *General Electric Co. Ltd.* v. *Price Commission*[3] (at page 12) when he stresses the supervisory nature of the jurisdiction:

"Parliament often entrusts the decision of a matter to a specified person or body, without providing for any appeal. It may be a judicial decision, or a quasi-judicial decision, or an administrative decision. Sometimes Parliament says its decision is to be final. At other times it says nothing about it. In all these cases the courts will not themselves take the place of the body to whom Parliament has entrusted the decision. The courts will not themselves make the original findings of fact. They will not themselves embark on a rehearing of the matter: see *Healey* v. *Minister of Health.*[4] But, nevertheless, the courts will, if called upon, act in a supervisory capacity. They will see that the decision-making body acts fairly: see *In re H.K. (An Infant)*[5] and *Reg.* v. *Gaming Board for Great Britain, Ex parte Benaim and Khaida.*[6] The courts will ensure that the body acts in accordance with the law. If a question arises on the interpretation of words, the courts will decide it by declaring what is the correct interpretation: see *Punton* v. *Ministry of Pensions and National Insurance.*[7] And if the decision-making body has gone wrong in its interpretation, they can set its order aside: see *Ashbridge Investments Ltd.* v. *Minister of Housing and Local Government.*[8] (I know of some expressions to the contrary, but they are not correct.) If the decision-making body is influenced by considerations which ought not to influence it; or fails to take into account matters which it ought to take into account, the court will interfere: see *Padfield* v. *Minister of Agriculture, Fisheries and Food.*[9] If the decision-making body comes to its decision on no evidence or comes to an unreasonable finding — so unreasonable that a reasonable person would not have come to it — then again the courts will interfere: see *Associated Provincial Picture Houses Ltd.* v. *Wednesbury Corporation.*[10] If the decision-making body goes outside its powers, or misconstrues the extent of its powers, then, too, the courts can interfere: see *Anisminic Ltd.* v. *Foreign Compensation Commission.*[11] And, of course, if the body acts in bad faith or for an ulterior object, which is not authorised by law, its decision will be set aside: see *Sydney Municipal Council* v. *Campbell.*[12] In exercising these powers, the courts will take into account any reasons which the body may give for its decisions. If it gives no reasons — in a case when it may reasonably be expected to do so, the courts may infer that it has no good reason for reaching its conclusion, and act accordingly: see *Padfield's* case."[9]

We would further refer to the judgment of this court in *Minister of Labour and Manpower & Anor.* v. *Paterson Candy (Malaysia) Sdn. Bhd.*[13] which also involved a trade union recognition dispute where the Registrar of Trade Unions made the relevant inquiry and would advert to and apply the test and approach laid down therein (at page 124) and again that set out in the judgment of this court in *National Union of Hotel, Bar and Restaurant Workers* v. *Minister of Labour and Manpower*[14] (at page 191). The very point in issue in these proceedings in fact arose in *Foh Hup Omnibus Co. Berhad* v. *Minister of Labour and Manpower & Anor.*[15] when this court held that the 1st respondent had a complete discretion as to the manner in which he was to act in settling a dispute as to recognition of a trade union and that there had been no breach of the rules of natural justice. Mr. Kulasegaran, however, seeks to distinguish that decision on the ground that there are 'fundamental differences', as he puts it, which however we find to be no more than purported reliance on factual minutiae which make no difference whatsoever to the ratio and principle enunciated in that case. Abdul Hamid J. (now F.J.), applying *Foh Hup Omnibus Co.*,[15] also decided to the same effect on July 13, 1979 in *Mogah Bus Company* v. *Minister of Labour and Manpower and the Transport Workers Union*[16] (Kuala Lumpur High Court Originating Motion No. 40 of 1973).

The affidavits put in disclose that the 1st respondent has acted properly in the exercise of his broad discretion in the matter under section 9(5) and has

taken all relevant matters into consideration and had sufficient evidence and material before him for the purposes of arriving at his decision to accord recognition to the 2nd respondent. We can see no reason or justification for interfering with his decision on an application of the principles governing the scope of judicial review we have adumbrated. The court cannot substitute its own judgment for that of the 1st respondent and will invalidate the exercise of his judgment or discretion only if satisfied that no reasonable person charged with his statutory responsibilities and with a due and proper appreciation of his statutory duties could have exercised his power in the way that he did (*United Kingdom Association of Professional Engineers & Anor.* v. *Advisory, Conciliation and Arbitration Service*[17]).

There is no material to indicate the method of the membership survey carried out by the appellant or the reason why it should displace or override and be considered more reliable and acceptable than the investigation and check made by an impartial official in the person of the Registrar of Trade Unions. When the appellant sent a list of its employees to the Director of Industrial Relations on February 28, 1977 pursuant to the latter's request on February 8, 1977, it could have but did not choose to send specimen signatures of its employees as well when it had an opportunity to do so but purported to make its own survey only after being apprised of the result of the Registrar of Trade Union's investigation. The 1st respondent is not required in law to verify the signatures of the appellant's employees as the appellant contends and any such exercise could and would perhaps by a logical extension of the appellant's argument on a *reductio ad absurdum* evolve into a full-scale inquiry and would in any event be impracticable and virtually impossible and only result in exacerbating the process of inquiry to the extent of negating the discretion vested in and properly exercisable by the 1st respondent under section 9(5), even to the point in the incidence of obduracy or intransigence on the part of one or both parties of requiring or necessitating verification by handwriting experts! The appellant appears to suggest the signatures may be forged, but if so the onus is on it to show this (for instance, by the employees concerned themselves making representations to that effect) but it has not done so apart from making veiled insinuations of far-fetched possibilities.

There has been no breach of the rules of natural justice when the 1st respondent did not accede to the request of the appellant made on June 22, 1977 for a further membership check in the presence of representatives of both parties, and we would refer to what was said in this connection in *Foh Hup Omnibus Co.*[15] (at pages 39-40). The rules of natural justice are not inflexible principles and may vary in their content in the circumstances of the case and in their ambit in the context of their application (*Mak Sik Kwong* v. *Minister of Home Affairs, Malaysia (No. 2)*[18] (at page 181)); (*Lewis* v. *Heffer*[19] (at pages 1076-1077 *per* Ormrod L.J.)); (*Bushell & Anor.* v. *Secretary of State for the Environment;*[20] *Regina* v. *Commission for Racial Equality, Ex parte Cottrell & Rothon*[21]).

Section 9(5) however incorporates a privative or ouster clause providing that a decision of the 1st respondent under that section shall be final and shall not be questioned in any court. The Privy Council reiterated in *South-East Asia Fire Bricks Sdn. Bhd.* v. *Non-Metallic Mineral Products Manufacturing Employees Union and Ors.*[22] that such a clause would not preclude the jurisdiction of the High Court to review a decision by *certiorari* if it is vitiated by jurisdictional error or is a nullity. We think it should be made clear, and any misconception to the contrary should immediately be removed and put to rest, that *South-East Asia Fire Bricks*[22] does not expound any new doctrine but only restates the law as it has always been, as since the nineteenth century the courts have consistently minimised the effect of ouster clauses which either directly or indirectly proscribe *certiorari* by interpreting them as protecting only those decisions which display non-jurisdictional error of law but as having no effect at all as regards jurisdictional review (*Mak Sik Kwong (No. 2)*[18] (at page 179), following and applying *Colonial Bank of Australasia* v. *Willan,*[23] a decision of the Privy Council which was approved and explained in the House of Lords by Lord Devlin in *Essex Incorporated Congregational Church Union* v. *Essex County Council*[24] (at pages 834-835)). If the 1st respondent did in fact err at all, and we find he did not, it did not go to jurisdiction nor did he infringe the rules of natural justice.

Mr. Kulasegaran, however, submits that *South-East Asia Fire Bricks*[22] was decided *per incuriam* and is not good law, on the argument, briefly, to the effect that section 9(5) is inconsistent and conflicts with the provisions of section 25(2) of the Courts of Judicature Act, 1964 which give the High Court the additional powers set out in the Schedule thereto and therefore with paragraph 1 of the Schedule which gives power to issue directions, orders or writs including writs *inter alia* of the nature of *certiorari*, and that in the circumstances the privative clause in section 9(5) cannot prevail against these provisions of the Courts of Judicature Act and is *pro tanto* void by virtue of section 4 thereof which provides that in the event of inconsistency or conflict between that Act and any other written law other than the Constitution in force at the commencement of that Act, the provisions of that Act shall prevail. Assuming for a moment for the sake of argument that there is in fact any such inconsistency or conflict as is contended, but there is none as will appear, section 4 of the Courts of Judicature Act can have no application as the provisions of the Courts of Judicature Act (apart from section 5 which took effect on September 16, 1963) came into force on March 16, 1964 but the Industrial Relations Act was enacted much later and brought into force on August 7, 1967 and indeed as a result of an amendment thereto section 9(5) itself only took effect on October 9, 1969, and it was therefore not in force at the commencement of the Courts of Judicature Act, thus negating any application of section 4 thereof in the event if at all of any inconsistency or conflict between the several statutory provisions in question.

There is, however, in any event no conflict or inconsistency between the provisions of section 25(2)

and paragraph 1 of the Schedule to the Courts of Judicature Act and section 9(5). The proviso to section 25 of the Courts of Judicature Act specifically enacts that all such powers of the High Court in the exercise of its jurisdiction as are referred to therein shall be exercised in accordance with any written law or rules of court relating to the same. The proviso limits or qualifies what precedes it and the whole section inclusive of the proviso is to be read in such a manner that they mutually throw light on each other and result in a harmonious construction. The powers conferred on the High Court in the Schedule to the Courts of Judicature Act are only enabling powers empowering the exercise of jurisdiction in respect of the matters specified therein but only in accordance with any written law or rules of court relating thereto. They are merely declaratory of the jurisdiction of the High Court and are subject to restrictions or conditions imposed by legislative provisions pertaining to their exercise and in relation to privative clauses subject to established judicial interpretation that the ouster of jurisdiction can only affect errors of law within the jurisdiction and not without nor if the decision sought to be impugned is a nullity. Section 25(2) of the Courts of Judicature Act does not confer any powers as such but only indicates that there is power to make such orders specified in the Schedule thereto as may be necessary when power so to do is either provided for or is not excluded by some statutory provision and then only within the ambit of its content. We should perhaps add that Mr. Kulasegaran also seeks to rely on the provisions of section 35 of the Courts of Judicature Act relating to the general supervisory and revisionary jurisdiction of the High Court in his argument on this point but promptly agreed and abandoned it when we pointed out that it has no relation whatsoever to the present proceedings. There is therefore neither substance nor merit in the submission made in this respect to question the validity of the decision in *South-East Asia Fire Bricks;*[21] we can find nothing to commend it except perhaps its audacity and misplaced ingenuity and reject the argument advanced.

In the light of all these considerations we see no cause for any justified complaint by the appellant in this matter and accordingly dismiss this appeal with costs. The deposit in court by way of security will be paid out to the respondents equally to account of their taxed costs. The costs of the 1st respondent both here and in the court below will of course be carried on a solicitor and client basis pursuant to the provisions of section 2(b) of the Public Authorities Protection Act, 1948.

Appeal dismissed.

Solicitors: *Ranjit, Thomas & Kula; K. Chandran & Co.*

VETHAGURU v. SIVAGNANACHELVI

[O.C.J. (Ajaib Singh J.) November 7, 1979]
[Seremban — Petition for Dissolution of Marriage No. 14 of 1977]

Family Law — Divorce — Cruelty — Standard of Proof — Whether marriage had irretrievably broken down — Allowance for wear and tear of married life — Conduct must be "of such a grave and weighty nature as to make cohabitation virtually impossible".

The petitioner in this case sought for divorce from his wife on the ground of cruelty. He said that being a Hindu he felt hurt by the refusal of the respondent to wear sarees and cholis suitable to that of a Hindu married woman. He had tried to restrain her from bobbing her hair to ear-length but to no avail. The respondent had indulged in playing hockey too often and had taken part in hockey matches out of town. He alleged that the respondent's parents had abused and humiliated him. As a result of all these he had suffered ill-health and a mental break-down. The petitioner claimed that the marriage had irretrievably broken down.

The respondent on the other hand had denied all these allegations. She stated that the root cause of their matrimonial troubles was her refusal to hand over her pay cheques to the petitioner after the birth of their child.

Held, dismissing the petition: (1) in order to establish the matrimonial offence of cruelty it must be shown that the acts and conduct complained of were grave and weighty to such an extent as to cause danger to the petitioner's health both body or mind or a reasonable apprehension of such a danger;

(2) the standard of proof required to establish cruelty is not beyond reasonable doubt as in a criminal case but is merely to prove it on preponderance of evidence that is on a balance of probabilities;

(3) intention is not a necessary ingredient of cruelty; the question to be decided is whether the respondent's conduct is cruel rather than whether the respondent is a cruel person;

(4) spouses take each other for better or worse and having entered into matrimony they must accept the ordinary wear and tear of married life;

(5) the evidence adduced in this case does not establish that the conduct of the respondent was of such a grave and weighty nature as to make cohabitation virtually impossible; the quarrels were of a trivial nature and largely because of the pay cheques.

PETITION.

N. Ramachandran (*K. Gunaretnam* with him) for the petitioner.

P.G. Segran for the respondent.

Cur. Adv. Vult.

Ajaib Singh J.: The petitioner seeks for divorce from his wife on the ground of cruelty. He alleges that the respondent's conduct towards him amounted to cruelty with the result that their marriage has irretrievably broken down. Giving particulars of cruelty on the part of the respondent the petitioner says that being a Hindu he felt hurt by the refusal of the respondent to wear sarees and cholis suitable to that of a Hindu married woman. Also that he has tried to refrain her from bobbing her hair to ear-length but to no avail, and that the respondent had failed to stop indulging in playing hockey too often and had taken part in hockey matches out of town. He says that the respondent's parents have also abused and humiliated him. Therefore as a result of all these he has suffered ill-health and a mental break-down.

The respondent on the other hand has denied all these allegations. She states that the root cause